UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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BRUCE KNIESPECK,

Plaintiff,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA, et al.,

Defendants.

CIV. NO. S-01-0878 WBS EFB

ORDER RE: MOTION FOR RECONSIDERATION AND ATTORNEYS' FEES AND COSTS

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Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, plaintiff moves for reconsideration of this court's Findings of Fact and Conclusions of Law ("Findings") entered on December 21, 2006, to augment the award of $171,720.00 to include prejudgment interest. Plaintiff also moves for attorneys' fees and costs. The factual history and procedural background are set forth in detail in the court's earlier Findings.

A. Motion for Reconsideration of Findings to Include Prejudgment Interest

The court did not address the question of prejudgment interest in its Findings because plaintiff did not discuss the question in his pretrial briefing, and when specifically asked

at the conclusion of the hearing whether he was seeking an award of prejudgment interest, plaintiff's attorney was unable to say whether plaintiff was seeking such relief, what legal authorities exist to support such a request, or what amount was appropriate.

It is not clear that a request for prejudgment interest is appropriately raised for the first time on a motion for reconsideration under Rule 59(e). Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000). Reconsideration is ordinarily appropriate only when the "district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." Sch. Dist. No. 1J, Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993); United States v. Westlands Water Dist., 134 F. Supp. 2d 1111, 1131 (E.D. Cal. 2001) (citing 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999)).

Since plaintiff did request prejudgment interest in the prayer of the complaint, and the court arguably could have considered the issue in its Findings notwithstanding plaintiff's apparent inability to address the issue at the time, with the issue now properly briefed, the court will consider plaintiff's request. See Osterneck v. Ernst & Whinney, 489 U.S. 169, 176 (1989) (finding proper a post-judgment motion for prejudgment interest, appropriately characterized as a motion to alter or

amend the judgment).

1. Awarding Prejudgment Interest

"Whether to award prejudgment interest to an ERISA plaintiff is 'a question of fairness, lying within the court's sound discretion, to be answered by balancing the equities.'" Landwehr v. DuPree, 72 F.3d 726, 739 (9th Cir. 1995); see also Shaw v. Int'l Ass'n of Machinists, 750 F.2d 1458 (9th Cir. 1985). In deciding whether to award prejudgment interest:

> [A] district court will consider a number of factors, including whether prejudgment interest is necessary to compensate the plaintiff fully for his injuries, the degree of personal wrongdoing on the part of the defendant, the availability of alternative investment opportunities to the plaintiff, whether the plaintiff delayed in bringing or prosecuting the action, and other fundamental considerations of fairness.

Osterneck, 489 U.S. at 176.

The court first concludes that prejudgment interest is necessary to fully compensate the plaintiff for his injuries. Plaintiff has been wrongfully denied his benefits for over eight years, an excessive period of time. Moreover, as a result of defendant's denial of benefits, combined with plaintiff's inability to work, plaintiff lost his home to foreclosure and became homeless. (UACL 00762-763.) Defendant has been collecting interest since September, 1998, on the money wrongfully withheld from plaintiff. An award of prejudgment interest amounts only to the defendant disgorging this ill-gotten profit. See Nichols v. Unum Life Ins. Co. of Am., 287 F. Supp. 2d 1088, 1095 (N.D. Cal. 2003) (citing Sweet v. Consol. Aluminum Corp., 913 F.2d 268, 270 (6th Cir. 1990)) (noting that "[f]ailure to award prejudgment interest in such a situation

'would approve of an unjust enrichment'"); see also Gelfgren v. Republic Nat. Life Ins. Co., 680 F.2d 79, 82 (9th Cir. 1982) ("To allow appellees to escape the payment of prejudgment interest would unjustly enrich appellees.").

Potential wrongdoing by defendant is not as clear--there is no persuasive evidence of bad faith. The administrative record contains a report that followed a Targeted Disability Income Multistate Examination ("TDIME"), which revealed questionable insurance practices by UNUM. The report, issued in November, 2004, included instances where "benefits were denied on the grounds that the claimant had failed to provide 'objective evidence' of a disabling condition," when the terms of the policy did not require such evidence. (UACL 00413.)

The report, however, does not refer to plaintiff's claim.[1] There is no specific evidence that UNUM acted inappropriately toward plaintiff. A finding of bad faith is not implied simply because this court determined that benefits were wrongly withheld. Although plaintiff provided medical opinions substantiating his claim for disability, defendant also proffered physician opinions to the contrary.

While this court therefore declines to find bad faith by UNUM, it concludes that the balance of the equities requires

[1] The report was, however, issued over eighteen months prior to UNUM's final denial of plaintiff's claim, which would have put UNUM on notice of the propriety of such practices.

awarding prejudgment interest.[2] Defendant would not experience any financial hardship by paying prejudgment interest, nor would such a payment negatively affect other UNUM policy beneficiaries. If plaintiff were awarded the past benefits without prejudgment interest, he would not be adequately compensated for defendant's withholding of his payments. See e.g. Fleming v. Kemper Nat. Servs., Inc. 373 F. Supp. 2d 1000, 1013 (N.D. Cal. 2005) (holding that plaintiff in an ERISA case was entitled to prejudgment interest on withheld benefits, despite a finding of no bad faith).

2. Prejudgment Interest Calcuation

"[T]he interest rate proscribed for post-judgment interest under 28 U.S.C. § 1961 is appropriate for fixing the rate of prejudgment interest unless the trial judge finds, on substantial evidence, that the equities of that particular case require a different rate." Grosz-Salomon v. Paul Revere Life Ins. Co., 237 F.3d 1154, 1164 (9th Cir. 2001). The interest rate for awarding prejudgment interest is based on the rate of a "fifty-two week United States Treasury bill[]." 28 U.S.C. § 1961. For prejudgment interest, as opposed to post-judgment interest, however, the court should apply the interest rate in effect at the time payment was due to the plaintiff, not the rate applicable on the date of judgment. See Nelson v. EG & G Energy Measurements Group, 37 F.3d 1384, 1391-92 (9th Cir. 1994)

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[2] Although defendant cites to several purported "delays" by plaintiff in the processing of his claim appeal, the court is convinced that these instances were simply plaintiff's attempts at gathering proper medical evidence to support his claim and appeal. (See, e.g., UACL 00482.)

(noting that the more accurate method of calculation would be to use the "rate at the beginning of each year").

Attached as Exhibit D to plaintiff's motion (filed separately as "Revised Interest Calculation") is a calculation of plaintiff's prejudgment interest according to the above formula. (Pl.'s Mot. to Amend Ex. C.) Plaintiff notes 52-week Treasury bill rates, for the beginning of each year between 1998 and 2006, of 4.87%, 4.58%, 6.09%, 5.11%, 2.28%, 1.42%, 1.31%, 2.79%, and 4.38%.[3] Based on these rates, and a monthly benefit of $1,717.20 from September, 1998, until the present, plaintiff is due $27,147.19 in prejudgment interest.

B. Motion for Attorneys' Fees

1. Awarding Attorneys' Fees

ERISA provides that "[i]n any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). The Ninth Circuit has established a five-factor test for awarding attorneys' fees, which considers:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980). "No one of the Hummell factors, however, is necessarily

[3] 4.87% represents the rate on September 1, 1998, not January 1, as that was when plaintiff's claim was first denied.

decisive, and some may not be pertinent in a given case." Carpenters S. Cal. Admin. Corp. v. Russell, 726 F.2d 1410, 1416 (9th Cir. 1984). The factors require a balancing of the equities, and the court need not find that each one supports an award of fees in granting such relief. Elwain McElwaine v. US West, Inc., 176 F.3d 1167, 1173 (9th Cir. 1999).

As discussed above, the court finds no bad faith by UNUM. Although the TDIME report listed past fiduciary misdeeds, there is no indication of such conduct in this case. Thus, this factor does not weigh in favor of an award of attorneys' fees.[4]

Defendant does not contest that they are capable of satisfying an award of fees. (Def.'s Opp'n to Pl.'s Mot. for Att'ys Fees 4-5.) Therefore, the second factor weighs in favor of such an award.

The third factor, the deterrent effect of an award on other persons in similar circumstances also weighs in favor of granting attorneys' fees. Defendant contends that "the award of the claim benefits to plaintiff represents a more than adequate deterrence for insurers." (Def.'s Opp'n to Pl.'s Mot. for Att'ys Fees 4.) However, the award of claim benefits represents an expense which the ERISA insurers already owe the beneficiaries. Thus, if the maximum amount of an award against an ERISA insurer were to be capped at the amount of the beneficiary's claim, there would be incentive for insurers to

[4] UNUM's conduct toward plaintiff, however, bears many similarities to the illegal and improper practices detailed in the TDIME report. Thus, while this court declines to find bad faith, it concludes that the absence of bad faith does not weigh strongly against awarding attorneys' fees.

deny every claim, and try their chances at litigation. "A fee award would deter other employers from forcing beneficiaries to undertake costly litigation to preserve their claims." McElwaine, 176 F.3d at 1173; see also Carpenters, 726 F.2d at 1416 (9th Cir. 1984).

The fourth factor also weighs in favor of an award of attorneys' fees. While plaintiff's motivation in bringing his claim was rooted in his desire to recover his own benefits, this action required a significant legal interpretation of the Policy. Phase 1 of the trial settled apparent ambiguities in the Policy, both as to the meaning of "partial disability," as well as to what proof of disability is required. (May 29, 2002 Order.) Such "a decision clarifying the terms of a plan after litigation would 'benefit all participants and beneficiaries' by settling a disputed provision or an ambiguity. This would be helpful to the trustees in future administration, but 'often depend[s] on a plaintiff's initiative in bringing suit.'" Smith, 746 F.2d at 590 (citing Carpenters, 726 F.2d at 1416).

The final factor, the relative merits of the parties' positions, also weighs in favor of awarding attorneys' fees. The court determined that plaintiff's claim should be been considered as one for "partial disability," and that UNUM's denial was improper. (Dec. 21, 2006 Order.) Despite defendant's repeated assertion that their position has been "meritorious," (Def.'s Opp'n to Pl.'s Mot. for Att'ys Fees 6-7), plaintiff prevailed on all issues before the court. Accordingly, this factor also counsels that an award of attorneys' fees is proper.

A finding of bad faith is not required in order to award attorneys' fees under ERISA. Smith, 746 at 590 ("Although bad faith is a factor that would always justify an award, it is not required. As there was no bad faith on either side, this factor should not have been considered decisive."); McElwaine, 176 F.3d at 1173 (noting that "bad faith is not a prerequisite to an ERISA fee award"). With the exception of this first factor, all other four Hummell factors weigh in favor of granting plaintiff's request. Moreover, "absent special circumstances, a prevailing ERISA employee plaintiff should ordinarily receive attorney's fees from the defendant." Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 590 (9th Cir. 1984). Accordingly, the court will award plaintiff reasonable attorneys' fees and costs.

2. Amount of Attorneys' Fees

The Ninth Circuit has adopted the hybrid lodestar/multiplier approach for determining reasonable fees in an ERISA action. Van Gerwen v. Guarantee Mut. Life Co., 214 F.3d 1041, 1045 (9th Cir. 2000) (citing Hensley v. Eckerhart, 461 U.S. 424 (1983)). First, a court calculates the "lodestar" amount by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. Hensley, 461 U.S. at 433. The party seeking an award must submit evidence supporting the hours worked and the rates requested--and a district court should exclude from the lodestar amount hours that are "excessive, redundant, or otherwise unnecessary." Id. at 434.

Second, the court may adjust the award upward or downward using a "multiplier" based on the Kerr factors:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Morales v. City of San Rafael, 96 F.3d 359, 364 n.8 (9th Cir. 1996) (citing Kerr v. Screen Guild Extras, Inc., 526 F.2d 67, 70 (9th Cir. 1975)). Many of the Kerr factors have been subsumed in the lodestar approach. Id. (citing Cunningham v. County of Los Angeles, 879 F.2d 481, 487 (9th Cir. 1988)). Moreover, while the court should consider the factors established by Kerr, it need not discuss each factor. Sapper v. Lenco Blade, Inc., 704 F.2d 1069, 1073 (9th Cir. 1983). Under federal law, there is a strong presumption that the lodestar amount is reasonable--only in rare instances should it be adjusted based on other factors. Morales, 96 F.3d at 363 n.8; Fischer v. SJB-P.D., Inc., 214 F.3d 1115, 1119 n.4 (9th Cir. 2000).

a. Hours Reasonably Expended

An attorney in an ERISA action may recover fees for services provided in conjunction with litigation, including costs prior to filing the complaint. Dishman v. UNUM Life Ins. Co. of Am., 269 F.3d 974, 987 (9th Cir. 2001). In addition, a party can recover fees for work done by paralegals. Trustees of Const. Indus. and Laborers Health and Welfare Trust v. Redland

Ins. Co., 460 F.3d 1253, 1256-57 (9th Cir. 2006). However, a party may not recover for services provided in relation to the administrative proceedings required to exhaust administrative remedies. Dishman, 269 F.3d at 987 n.51 (citing Cann v. Carpenters Pension Trust Fund for N. Cal., 989 F.2d 313, 314 (9th Cir. 1993)).

Plaintiff's counsel presents an itemized list totaling 237.6 hours of attorney work, 132.70 hours of work by an "assistant," and 4.85 hours of work by a secretary.[5] (deVries Decl. Ex. 1.) Defendant challenges the reasonableness of the amount of time spent on two tasks: 1) the creation of a detailed index of the administrative record; and 2) plaintiff's extensive preparation for the December 18, 2006, trial. (Def.'s Opp'n to Pl.'s Mot. for Att'ys Fees 15-16.) Defendant additionally objects to numerous tasks that defendant contends were performed as part of UNUM's administrative review. (Def.'s Opp'n to Pl.'s Mot. for Att'ys Fees 9-14.)

i. Excessive Hours

In October and November, 2006, the "assistant" of plaintiff's counsel billed fifty hours for the creation of a "detailed index of second (final) administrative record and entry into summation litigation support system; production of detailed chronological index, numerical index, and sub-indexes." (deVries Decl. Ex. 1.) Plaintiff does not provide any further detail explaining the division of these hours or what specific

[5] Plaintiff's attorney augmented his total request for 217.8 hours, with a billing summary for 19.8 more hours of attorney time expended since filing this motion. (Supp. deVries Decl. Ex. 1.)

tasks were performed. The court agrees that spending fifty hours to organize the administrative record is excessive, and accordingly will reduce this amount by half (i.e. twenty-five "assistant" hours).

Plaintiff also asserts that its attorneys spent fifty-five hours in preparation for the Phase 2 trial before this court, including thirty hours drafting the trial brief. The court finds this to be excessive, especially in light of the twenty-one hours it took plaintiff's counsel to prepare for the Phase 1 trial. This court is unpersuaded that thirty hours is reasonable to prepare the Phase 2 trial brief, or that an additional twenty hours were necessary for general trial preparation. Moreover, plaintiff counsel's singular line item for both of these expenses is an insufficient itemization to convince this court that such an expenditure of time was reasonable.[6] Accordingly, the court will also reduce these hours by half (i.e. twenty-seven and a half attorney hours).

ii. Unrecoverable Administrative Fees

Defendant contends that many tasks in plaintiff's bills are unrecoverable because they relate to the administrative review process. (Def.'s Opp'n to Pl.'s Mot. for Att'ys Fees 9-14; see Cann, 989 F.2d at 314.) While it is

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[6] Plaintiff's billing itemization contains one entry on page 11 which reads, "11/07/06-11/17/06 (Atty) 'Prepare, finalize and file Trial brief' - 30 hours x $350 = $10,500," and one entry on page 12, which reads, "12/13/06-12/16/06 (Atty) 'Trial preparation; detailed review of administrative record and trial briefs; outline analysis/argument' - 20 hours x $350 = $7,000." Such vague and condensed entries, for services totaling over $17,000, are insufficient to support the reasonableness of the fee requests.

undisputed that attorneys' fees are not recoverable for administrative work done prior to filing a complaint, it is an issue of first impression in the Ninth Circuit whether attorneys' fees in an ERISA case may be recovered for work related to administrative review after a complaint is filed, i.e. pursuant to a court-ordered remand. Plaintiff asks this court to follow the Second Circuit in Peterson v. Continental Casualty Company, where the court awarded attorneys' fees incurred during administrative proceedings ordered by the court. 282 F.3d 112 (2d Cir. 2002).

Upon review of Supreme Court and Ninth Circuit precedent, this court declines to follow the Second Circuit in Peterson. The Second Circuit based its holding on interpretation of two Supreme Court cases, Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546 (1986) and Sullivan v. Hudson, 490 U.S. 877 (1989). However, the Ninth Circuit addressed the general issue of awarding attorneys' fees for administrative work, noting that:

> [In Delaware Valley and] Hudson, the attorneys' fees were incurred in prosecuting a remand through an administrative agency after the claimant's attorney prevailed in the district court. In these circumstances, a court has already decided that the party is entitled to prevail, but in the pre-adjudication phase at issue before us, such a determination has not yet been made. Also, the administrative proceedings in those cases were before administrative agencies of government. In the case before us . . . they are actually part of a private, albeit regulated, claims process within the pension fund trust, enabling a claimant to obtain review of a denial within the trust before having to litigate. 29 U.S.C. § 1133(2).

Cann, 989 F.2d at 317 (emphasis added).

In Delaware Valley, the subsequent administrative action sought to enforce, through administrative proceedings, a judicially-approved consent decree. The post-remand administrative procedures were necessary and integral to accomplishing the relief already ordered by the district court. See also Flores v. Shalala, 49 F.3d 562, 571 (9th Cir. 1995) (noting the severely limiting effect of Shalala v. Schaefer, 509 U.S. 292 (1993), on the holding of Hudson, such that an award of fees for post-remand administrative work is only proper in the very limited case "in which the court incorrectly retains jurisdiction and this retention of jurisdiction goes unchallenged").

In this case, like in Cann, when this court remanded the claim back to UNUM, it had not ruled on the primary substantive dispute, only the proper context for plaintiff's claim. Plaintiff's claim was then sent back for administrative review consistent with that interpretation. This review under ERISA was part of a private claims process under ERISA which does not require litigation. See Amato v. Bernard, 618 F.2d 559, 576 (9th Cir. 1980). As noted by the Cann court, allowing recovery of attorneys' fees incurred during administrative review runs counter to the stated purpose of ERISA[7], because it would "encourag[e] plans to pay questionable claims in order to avoid liability for attorneys' fees, [thereby] reduc[ing] their 'soundness and stability.'" Cann, 989 F.2d at 317. This

[7] Noting the need to promote "the soundness and stability of plans with respect to adequate funds to pay promised benefits." 29 U.S.C. § 1001(a).

reasoning applies whether the administrative review occurs before or after a complaint has been filed. The court therefore declines to award attorneys' fees for post-remand work related to the administrative review of plaintiff's claim.

The party seeking fees bears the burden of submitting evidence to support their request. Hensley, 461 U.S. at 434. Upon review of the tasks to which defendant objects, the court agrees that most relate to administrative review of plaintiff's claim. These items all occurred between the two phases of trial, while plaintiff's claim was before UNUM on remand. Moreover, the descriptions evince general communications between plaintiff's attorney, plaintiff, and defendant--there is nothing to contradict the reasonable presumption that work done during this period related to the administrative review. This court finds that, with six exceptions, all of the tasks highlighted in defendant's opposition are related to the administrative process.[8] These unrecoverable tasks total 67.55 attorney hours, 53.3 assistant hours, and will accordingly be subtracted from plaintiff's request.

b. Reasonable Rate

To determine the reasonableness of hourly billing rates, the court looks to the prevailing market rates in the relevant community for similar work performed by attorneys of

[8] The court finds that the following six tasks, objected to by plaintiff, appear to be reasonably related to the litigation: (1) "6/07/02 - Letter to Client re decision in Phase I trial;" (2) "3/04/04 - Review Court's Minute Order, follow up;" (3) "4/26/04 - Status Conference;" (4) "6/17/04 - Review letter from Anna Martin and stipulation to continue trial date;" (5) "7/08/04 - File stipulation to continue trial;" (6) "5/19/05 - T/c from Judge Shubb's clerk."

comparable skill, experience, and reputation. Blum v. Stenson, 465 U.S. 886, 895 (1984); Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210-11 (9th Cir. 1986). Under federal law, the relevant community is the forum in which the district court sits, as opposed to where counsel is located. Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997).

Plaintiff's counsel seeks a rate of $350 per hour for Mr. deVries, $100 per hour for an unnamed "assistant," and $30 per hour for an unnamed secretary.[9] Defendant asks this court to lower Mr. deVries' rate to $190 per hour, and the assistant's rate to $70 per hour. Upon consideration of the prevailing market rates for similar work, this court concludes that plaintiff's requested rate for those services is reasonable.

In cases brought under the Americans with Disabilities Act (ADA"), 42 U.S.C. §§ 12101-12300, this court has held the attorneys fees to $250 per hour for an experienced attorney, $150 for associates, and $75 for paralegals, pointing out that the work is relatively standardized and plaintiffs are reasonably assured of being the prevailing parties in those cases. White v. GMRI, Inc., CIV. S-04-0620 slip op. at 16 (E.D. Cal. Jan. 19, 2006). In contrast, ERISA cases such as this are typically unique in their facts and plaintiffs are far from assured of prevailing. Consistent with these considerations, a judge of this court recently approved rates in a class action ERISA case of $495 per hour for a partner, $295 per hour for an associate, and $150 per hour for a paralegal See Aguilar v.

[9] Because plaintiff does not explain what an "assistant" is, this court will interpret an assistant to be a paralegal.

Melkonian Enters., Inc., CIV. No. 05-0032 slip op. at 8 (E.D. Cal. Jan. 24, 2007).

Mr. deVries has been a civil litigation attorney for over thirty years, specializing in insurance claims cases, and is a widely published author and speaker on the subject. (deVries Decl. 4.) DeVries' declaration establishes that his customary hourly billing rate is $300-350 per hour. See Davis v. City & County of San Francisco, 976 F.2d 1536, 1547 (9th Cir. 1992) (concluding that declarations of prevailing market rate in relevant community are sufficient to establish appropriate rate for lodestar purposes). While not dispositive, a court may also look to surrounding districts for guidance "because ERISA cases involve a national standard, and attorneys practicing ERISA law in the Ninth Circuit tend to practice in different districts." Mogck v. UNUM Life Ins. Co. of America, 289 F. Supp. 2d 1181, 1191 (S.D. Cal. 2003) (approving rates for ERISA attorneys of $350 and $325 per hour); see e.g., Mardirossian v. Guardian Life Ins. Co. of Am., 457 F. Supp. 2d 1038, 1047 (C.D. Cal. 2006) (awarding $400 per hour for an ERISA attorney with over twenty years experience); Farhat v. Hartford Life and Acc. Ins. Co., CIV. No. 05-0797 slip op. at 7 (N.D. Cal. Aug. 30, 2006) (finding that a reasonable rate for experienced ERISA attorneys falls between $400 and $495 per hour).

Where a plaintiff submits affidavits regarding prevailing rates in the community, the Ninth Circuit has implied that defendants cannot simply disagree with this evidence, but should "support their arguments with any affidavits or evidence of their own regarding legal rates in the community." See

United Steelworkers of Am. v. Phelps Dodge Corp., 896 F.2d 403, 407 (9th Cir. 1990). Other than a single case from the Northern District, defendant provides no affidavits or persuasive legal authority that suggests plaintiff's requested rate is unreasonable. Accordingly, the court will award attorneys' fees based on a rate of $350 per hour for Mr. deVries, $100 per hour for "assistant."

Mr. deVries' request to be reimbursed for work done by his secretary, however, will be disallowed. In Eiden v. Thrifty Payless Inc., 407 F. Supp. 2d 1165, 1171 (E.D. Cal., 2005) this court denied a request to include fees for work performed by legal secretaries, upon the theory that the salaries and benefits paid to support staff are "a part of the usual and ordinary expenses of an attorney in his practice," and are properly classified as overhead. (Citing In re Pac. Exp., Inc., 56 B.R. 859, 865 (Bkrtcy. E. D. Cal., 1985)). Admittedly, there may be communities where such salaries and benefits are customarily passed on to clients in the form of legal bills, and thus would be recoverable as part of attorneys' fees. See Missouri v. Jenkins, 491 U.S. 274, 285 (1989). However, it is not the court's understanding that such is generally the practice in the Sacramento community.

3. Costs

In an ERISA action, courts may award "only the types of 'costs' allowed by 28 U.S.C. § 1920, and only in the amounts allowed by section 1920 itself, by 28 U.S.C. § 1821 or by

similar such provisions."[10] Agredano v. Mutual of Omaha Cos., 75 F.3d 541, 544 (9th Cir. 1996). Plaintiff submits a bill of costs totaling $442.45, for filing, service, and court reporter fees.

Defendant's challenges plaintiff's request for reimbursement of $232.45 in court reporter fees, for a transcript of UNUM's field investigator's interview with plaintiff. The field visit (sought in conjunction with an "independent medical examination") occurred at the urging of UNUM as part of its claim investigation process. (UACL 00654.) Plaintiff's counsel insisted the court reporter attend, although the interview did not require it. (Id.) The court therefore concludes that the field interview (and accompanying transcript) was part of the administrative review process and thus, as per this court's previous discussion, supra Section (II)(B)(2)(a)(ii), not recoverable. Accordingly, the court will allow plaintiff to recover costs in the amount of $210.00.

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[10] 28 U.S.C. § 1920 provides:
A judge or clerk of any court of the United States may tax as costs the following:
(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

IV. Conclusion

In accordance with the foregoing discussion, attorneys' fees, litigation expenses, and costs are awarded in the following amounts:

Mr. deVries:

237.6 hrs -(27.5 + 67.55) x $350/hr = $49,892.50 +

Assistant:

132.7 hrs -(53.3 + 25) x $100/hr = $5,400.00 +

Costs $210.00 =

TOTAL **$55,502.50**

IT IS THEREFORE ORDERED that plaintiff's motion to amend the judgment be, and the same hereby is, GRANTED. Plaintiff is entitled to prejudgment interest on benefits withheld in the amount of $27,147.19.

IT IS FURTHER ORDERED that plaintiff's motion for attorneys' fees and costs be, and the same hereby is, GRANTED, in the amount of $55,502.50.

DATED: February 12, 2007

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE